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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. SHAWN SMITH et al., Defendants and Appellants.	B236862 (Los Angeles County Super. Ct. No. BA379615)

APPEAL from the judgment of the Superior Court of Los Angeles County. Dennis J. Landin, Judge. Affirmed with modifications.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant Shawn Smith.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant Chakel West.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

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SUMMARY

Defendants Shawn Smith and Chakel West were together charged with six counts of robbery (Pen. Code, § 211, counts 1-6).[1] Prior conviction and prison term allegations were alleged against Smith (§§ 1170.12, subds. (a)-(d), 667, subd. (b), 667.5). West was also charged with misdemeanor sexual battery (§ 243.4, subd. (e)(1), count 7). The trial court denied defendants' motions to be tried separately. West represented himself at trial and testified in his own defense. The jury convicted defendants of all counts, and the trial court found Smith's prior offense allegations to be true. Smith was sentenced to an aggregate term of 30 years to life in prison, consisting of 25 years to life under the Three Strikes law on count 1, and a five-year serious felony enhancement. He received the same sentence for the other counts, to run concurrently with count 1. West was sentenced to an aggregate prison term of eight years and six months, consisting of the midterm of three years on count 1, with consecutive one-year terms for counts 2 through 6 (consisting of one-third the midterm of three years), with a consecutive six-month sentence on the sexual battery count.

On appeal, Smith contends the trial court failed to instruct the jury, sua sponte, to view West's testimony with caution; abused its discretion when it denied his motion to sever his trial from West's trial; and abused its discretion under *Romero*[2] when it refused to strike one of his prior strike convictions. Defendant West contends the instruction on the robbery count did not properly define "temporary safety." He also joins in any of Smith's arguments that may inure to his benefit, but provides no individualized argument or analysis. Finding no merit in any of the above contentions, we affirm.

FACTS

On January 1, 2011, at 2:30 a.m., Irving Romero, Spencer McGee, Beatriz DeAlba, K.M., and Mynor Palencia were on 39th Place in Los Angeles, walking to

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1 All undesignated statutory references are to the Penal Code.

2 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

Romero's car after attending a New Year's Eve party at the Los Angeles Coliseum. Smith and West walked up to them, and Smith told the group they were being robbed. Smith told the partygoers to give him everything in their pockets or he would shoot them. He did not brandish a gun, but kept one hand in his pocket, positioned as if he held a gun.

Romero gave his cell phone and a whistle to Smith. He saw West take items from the other victims.

Palencia gave $9 and two Subway receipts to Smith. Palencia gave K.M.'s phone, which he was holding for her, to West. He saw one of the defendants take the money and the other take the phones.

McGee gave Smith $58, his cell phone, and a Salvadoran coin. West took items from other group members as Smith was yelling that they were being robbed. Also, Smith handed property he had taken to West.

K.M. told defendants that she did not have anything, because her pants did not have pockets. Smith told her to give him her earrings. She gave one of her earrings to Smith. West walked toward her, and she tried to give him her other earring. West tapped her breast and told her she had "nice tits." He grabbed her buttocks and whispered something in her ear. West dropped K.M.'s earring back in her hand.

DeAlba gave her cell phone to Smith.

Smith allowed the group to leave, one by one. Romero walked to a friend's house, where he had parked his car before the party, and called police. He saw defendants jump over a nearby fence. Police arrived 15 minutes later.

Defendants approached another group of partiers on 39th Place at approximately 2:30 a.m. Smith told them to give him their wallets and jewelry and said he had a gun. Jairo Ayon handed his wallet to West. West checked the wallet and returned it to Ayon because it held no money. Ayon handed his watch to Smith.

Defendants started to walk away, but turned around and ran towards Ayon and his group. Defendants crossed the street to a gate that led to an apartment building and banged and screamed at the gate.

Los Angeles Police Officers Matthew Casalicchio and Danny Monterroso were patrolling near 39th Place when they were flagged down by a third group, who told them defendants had tried to rob them. They described defendants and pointed to where they were last seen. The officers saw defendants standing next to a gate on 39th Place. The police handcuffed defendants and returned Ayon's watch to him. The officers detained them.

The officers recovered the following items from Smith: Palencia's Subway receipts and $9, McGee's Salvadoran coin and $58, DeAlba's cell phone, Romero's whistle, K.M.'s earring, and Ayon's wristwatch. The officers recovered from West the cell phones belonging to McGee, K.M., and Romero, and an additional white cell phone. The items were returned to their owners.

Smith's girlfriend, Penny Brown, testified that she had a party at her apartment from 6:30 p.m. to 2:30 a.m. on the night of the robberies. Smith was there most of the night and appeared to be drunk. As the party was coming to an end, Brown went outside and saw Smith in a police car.

West also attended the party. Brown told a defense investigator that West was her cousin, but admitted at trial that she was not related to West.

West testified that he left Brown's party at 1:30 a.m. He had never been in trouble before. The white cell phone police recovered belonged to him. He denied possessing the other cell phones, and believed he was wrongfully identified.

Defendants were found guilty on all counts. During sentencing, the trial court denied defendant Smith's *Romero* motion to dismiss one of his prior strike convictions for sentencing purposes.

Defendants filed timely appeals.

DISCUSSION

1. Accomplice Testimony

Smith contends the trial court should have instructed the jury, sua sponte, to view West's testimony with caution, as set forth in CALCRIM No. 334 and CALJIC No. 3.18. A trial court should give CALCRIM No. 334 or CALJIC No. 3.18 when an accomplice

testifies, and that testimony tends to incriminate the defendant. (*People v. Howard* (2008) 42 Cal.4th 1000, 1021-1022; *People v. Guiuan* (1998) 18 Cal.4th 558, 569.) The instructions inform the jury that an accomplice's testimony must be viewed with caution, and that the jury may not convict a defendant on the accomplice's testimony alone. Rather, the accomplice's testimony must be corroborated by independent supporting evidence. (See CALCRIM No. 334; see also CALJIC No. 3.18.) An accomplice's testimony may include "'all oral statements made by an accomplice or coconspirator under oath in a court proceeding *and* all out-of-court statements of accomplices and coconspirators used as substantive evidence of guilt which are made under suspect circumstances.'" (*People v. Williams* (1997) 16 Cal.4th 153, 245; see also *People v. Lawley* (2002) 27 Cal.4th 102, 160.)

The only accomplice testimony cited in Smith's opening brief is West's testimony that he met Smith when Smith "first got out." The jury may have understood from this testimony that Smith served time in custody, but this testimony did not incriminate Smith in the commission of the charged crimes. (*People v. Howard*, *supra*, 42 Cal.4th at pp. 1021-1022.)

Smith also rests this argument on West's questions during cross-examination of the prosecution's witnesses, when he was representing himself. In his cross-examination of Romero, West asked, "Now, on this report, you state that suspect Smith did all the talking and that was the person that robbed you from behind?" While cross-examining McGee, West asked whether he saw "the second person collecting property from any of your friends." While cross-examining Officer Monterroso, West repeatedly asked whether the victims told him that there was only one person who robbed them.

However, the questions asked of witnesses by counsel or self-represented parties are not testimonial, and therefore are not accomplice testimony. (See *People v. Samayoa* (1997) 15 Cal.4th 795, 844; *People v. Barajas* (1983) 145 Cal.App.3d 804, 809.) The jury was instructed with CALCRIM No. 222, which provides, in part, that "[n]othing that the attorneys say is evidence. . . . Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they helped you to

understand the witnesses' answers. Do not assume something is true just because one of the attorneys asked a question that suggested it was true." Because the jury was instructed that West's questions were not testimonial, and could not be considered as evidence, and because no accomplice testified in a way that tended to incriminate Smith, we conclude the trial court had no obligation to give an accomplice testimony instruction. (See *People v. Samayoa*, at p. 844; see also *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 598-599 [the jury is presumed to have followed instructions].)

Moreover, even if we were to treat West's questions as "testimonial" in nature, any claim of error in failing to give the accomplice instruction was necessarily harmless. There was ample evidence corroborating the inference from West's questioning of witnesses that Smith robbed the victims. The police recovered property taken from all of the victims from Smith, and the victims identified Smith at trial as one of the people that robbed them. Quite simply, there is no reasonable possibility that if the trial court had given these instructions, the jury would have reached a different verdict. (*People v. Lewis* (2001) 26 Cal.4th 334, 370, 371.)

2. Severance

Next, Smith contends he was denied a fair trial because the court denied his motion to sever his trial from West's trial. "Our Legislature has expressed a preference for joint trials." (*People v. Lewis* (2008) 43 Cal.4th 415, 452; *People v. Boyde* (1988) 46 Cal.3d 212, 231.) "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials." (§ 1098.) Joint trials are preferred because they promote economy and efficiency and because they serve the interests of justice by avoiding possibly inconsistent verdicts. (*People v. Coffman* (2004) 34 Cal.4th 1, 40.) A joint trial is proper where multiple defendants are charged with common crimes involving common events and victims. (*People v. Lewis, supra*, at pp. 452-453.) On the other hand, the trial court is afforded discretion to order separate trials, and severance may be appropriate "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the

possibility that at a separate trial a codefendant would give exonerating testimony." (*People v. Massie* (1967) 66 Cal.2d 899, 917, fns. omitted; *People v. Coffman*, *supra*, at p. 40.)

We review a trial court's denial of a severance motion for abuse of discretion based on the facts as they appeared when the court ruled on the motion. (*People v. Hardy* (1992) 2 Cal.4th 86, 167.) "If we conclude the court abused its discretion, reversal is required only if it is reasonably probable that the defendant would have obtained a more favorable result at a separate trial." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 452; see also *People v. Coffman*, *supra*, 34 Cal.4th at p. 41.) However, if the court's joinder ruling was proper when it was made, we may reverse a judgment only on a showing that the joinder "'resulted in "gross unfairness" amounting to a denial of due process.'" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.)

Smith contends that West's behavior at trial made it impossible for him to have a fair trial, stating that his "insinuation during his cross-examination of witnesses was antagonistic; West minimized his own guilt and blamed [Smith] for the offenses." We disagree. As discussed above, West did nothing to incriminate Smith. Although he attempted to elicit testimony that Smith may have acted alone, the witnesses all testified that both Smith and West acted together. Therefore, we cannot conclude that West presented an antagonistic defense, or that his conduct in any way resulted in "gross unfairness" to Smith, or that Smith would have obtained a more favorable result had defendants been tried separately. (*People v. Souza* (2012) 54 Cal.4th 90, 112.)

We note that West also made a pretrial severance motion and in this appeal "joins in issues raised in co-defendant's brief to the extent they benefit him." West has pointed to no facts or law which would render the trial court's denial of his motion an abuse of discretion or grossly unfair (*People v. Stanley* (1995) 10 Cal.4th 764, 793), and for the reasons discussed above as to Smith, we can find no error.

3. *Romero*

Smith also complains that the trial court abused its discretion when it denied his motion to dismiss one of his prior strike convictions. He contends he does not fall within

the spirit of the Three Strikes law, because his strikes were remote, as they both arose from a 1999 case; and because he did not hurt his victims in the current offenses, was intoxicated, and did not actually possess a gun. We disagree, and find no abuse of discretion.

Trial courts have discretion under section 1385 to dismiss Three Strikes allegations in the furtherance of justice. We review the trial court's decision under the abuse of discretion standard of review. (*Romero*, *supra*, 13 Cal.4th at pp. 529-530; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 992-993.) The burden is on the party attacking the sentence to show the sentencing decision was an abuse of discretion. In the absence of such a showing, the trial court is presumed to have acted appropriately, and a sentence will not be set aside. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) An abuse of discretion occurs only when the trial court was not aware of its discretion to dismiss, where the court considered impermissible factors, or where the defendant clearly falls outside the spirit of the Three Strikes law. (*People v. Scott* (2009) 179 Cal.App.4th 920, 926.) The analysis is whether, in light of the nature and circumstances of the present crimes and prior qualifying conviction, and defendant's background, character, and prospects, he may be deemed outside the spirit of the Three Strikes law and should therefore be treated as if he had not previously been convicted of the qualifying felony. (*Carrasco*, at p. 993.)

Smith's qualifying strikes are 1999 convictions for attempted murder and robbery (§§ 664, 187, 211), stemming from defendant's acts with a fellow gang member, where defendant held down the victim while his associate shot him and demanded the victim's car keys. At the time of the crimes, Smith was nearly 19 years old. Smith was sentenced to 12 years in prison. At the time of the instant offenses, he was on parole, and had only recently been released from prison.

In his *Romero* motion, Smith asked the court to dismiss one of his strike offenses, arguing that he "had been drinking for several hours. . . . [T]here was no gun ever found or used[] [and he] did not molest any of the victims." Defendant also contended that "he was quite young when he was sentenced on the original case." In considering

defendant's motion, the trial court did not strike either of defendant's 1999 convictions, finding that it was not "appropriate given the nature of the criminal activity Mr. Smith engaged in . . . [the] late 1990's."

The trial court understood the scope of its discretion and decided not to dismiss one of Smith's strike allegations because of the nature of the qualifying strikes. Defendant's conduct does not demonstrate that he has learned any lesson from his previous incarceration, as he re-offended soon after being released from prison while he was still on parole. The trial court did not err in finding defendant is within the spirit of the Three Strikes law. (See *People v. Williams* (1998) 17 Cal.4th 148, 163.)

4. Place of Temporary Safety

West contends the trial court erred by instructing the jury with the standard CALCRIM No. 1603 aiding and abetting robbery instruction. Although the instruction twice uses the word "temporary," West contends the instruction improperly emphasized the "permanence" of a place of temporary safety, and failed to explain that temporary safety may be fleeting or momentary. West contends that, somehow, this failure prevented the jury from finding that he only received stolen property after the robberies were completed. West's theory on appeal is that the jury may have reasonably found he did not intend to aid and abet the robbery of the first group of partygoers because he was focused on his sexual battery upon K.M. while Smith was taking and carrying away their property. West argues the jury may have found he was unaware that robberies had occurred if the trial court had not "stressed that the place of temporary safety had to be permanent."

Respondent argues that this issue was forfeited, because West did not object to the written instruction at trial. West replies that because his substantial rights are affected, this court may review the error without an objection. West also contends that because the challenged instruction was not correct in law, he did not have to object at trial. (See *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087.) We are not persuaded either that the instruction violated West's rights or that the instruction does not accurately state the law.

"In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights. In making this determination we consider the specific language under challenge and, if necessary, the instructions as a whole." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585; *People v. Castillo* (1997) 16 Cal.4th 1009, 1016 [The correctness of jury instructions is determined "'from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction'"].)

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) A robbery continues "as long as the loot is being carried away to a place of temporary safety." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165 & fn. 8 (*Cooper*).) Aider and abettor liability attaches if the intent to aid in the robbery is formed before or during the carrying away of the property to a place of temporary safety. (*Id.* at pp. 1164-1165.) A place of temporary safety may be reached momentarily; the defendant need not permanently escape with the loot. (See *People v. Boss* (1930) 210 Cal. 245, 250-251.) However, a defendant has not reached a place of temporary safety with the loot if he is present at the scene of the crime, or while fleeing from the scene of the crime. (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1296-1297; *People v. Salas* (1972) 7 Cal.3d 812, 821-823.)

Here, the trial court instructed the jury with the standard CALCRIM No. 1603 instruction: "To be guilty of robbery as an aider and abettor, the defendant must have formed the intent to aid and abet the commission of the robbery before or while a perpetrator carried away the property to a place of temporary safety. [¶] A perpetrator has reached a place of temporary safety with the property if he or she has successfully escaped from the scene, is no longer being pursued, and has unchallenged possession of the property." The court also instructed the jury with CALCRIM No. 401: "To prove that defendant Chakel West is guilty of a crime based on aiding and abetting that crime,

the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone *aids and abets* a crime if he knows of the perpetrator's unlawful purpose and he specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."

CALCRIM No. 1603 is a correct statement of the law. The instruction provides the intent to aid and abet a robbery must be formed before the perpetrator has carried the property away to a place of temporary safety. (*Cooper*, *supra*, 53 Cal.3d at p. 1165.) The instruction specifically states the place of safety need only be "temporary," which is a simple word widely understood to mean "lasting or meant to last only for a limited time." (Oxford American Desk Dict. (2d ed. 2001) p. 862.) We are not persuaded that the instruction "stressed the permanence of 'temporary safety' and thus was incorrect." Nor are we persuaded that West's rights were in any way affected by the absence of additional words in the instruction to the effect that temporary safety may be only momentary. We find no merit to West's claim of error in the court's instructing the jury on the elements of robbery on an aiding and abetting theory.

5. Abstracts of Judgment

Respondent contends that West's abstract of judgment must be amended to reflect additional fines and fees. During its oral pronouncement of judgment, the trial court imposed a $10 crime prevention fine (§ 1202.5) for each of the seven counts of which West was convicted. The abstract of judgment, however, only imposed one crime prevention fine. We find no error in the abstract of judgment, because the court may only impose one crime prevention fine "[i]n any *case* in which a defendant is convicted of any . . . offense[] enumerated in Section 211." (§ 1202.5, subd. (a), italics added; *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 ["the crime prevention fine can be imposed only

once '[i]n any case'"].) Accordingly, defendant Smith's abstract of judgment, which includes six crime prevention fines, should be amended to only include one.

Respondent also contends that other required penalties were not assessed against defendants Smith and West. Because both defendants were assessed crime prevention fines under section 1202.5, subdivision (a), the court was required to assess other penalties. (See §§ 1202.5, subd. (a) [$10 fine]; 1464, subd. (a)(1) [$10 state penalty]; 1465.7, subd. (a) [$2 surcharge]; Gov. Code, §§ 76000, subd. (a)(1) [$7 county penalty]; 70372, subd. (a)(1) [$5 court construction penalty]; 76000.5, subd. (a)(1) [$2 penalty]; 76104.7, subd. (a), Stats. 2009-2010, ch. 3, § 1 [$3 penalty]; § 76104.6, subd. (a)(1) [$1 penalty].) Defendants' abstracts of judgment should be amended to include these additional penalties.

DISPOSITION

The judgment is affirmed as modified. The abstracts of judgment for Smith and West are amended to include $30 in penalty assessments. Smith's abstract of judgment is also amended to include only one $10 fine under section 1202.5, subdivision (a). The superior court is directed to prepare amended abstracts of judgment and shall forward certified copies of the same to the Department of Corrections.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.